

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA.**

In the matter of an application for Revision under and in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

**Court of Appeal case no.
CA/PHC/86/2016
H.C. Colombo case no.
B 1995/2014**

Director General,
Commission to Investigate Allegation of
Bribery or Corruption,
Colombo 07.

Complainant

Vs.

Kanakapullige Don Ajith Munasinghe,
Behind the Bus Depot, Wennappuwa.

Accused

And

Warnaklasuriya Jude Ivone Fernando,
"Alik", Medathodua, Thoduwawa.

Petitioner

Vs.

Director General,
Commission to Investigate Allegation of
Bribery or Corruption,
Colombo 07.

Respondent.

And now Between

Warnaklasuriya Jude Ivone Fernando,
“Alika”, Medathodua, Thoduwawa.

Petitioner Petitioner

Vs.

Director General,
Commission to Investigate Allegation of
Bribery or Corruption,
Colombo 07.

Respondent Respondent.

Before : H.C.J.Madawala J.

: L.T.B. Dehideniya J.

Counsel : Gamini Hettiarachchi for the Petitioner Petitioner.

: Anutthara Jayasinghe with Gayan Maduwage for the
Respondent Respondent.

Argued on : 03.11.2016

Written submissions filed on 14.11.2016 and 21.11,2016

Decided on : 23.11.2016

L.T.B. Dehideniya J.

The Complainant Respondent (the Respondent) indicted the Accused in the High Court of Colombo for soliciting five brandy bottles and accepting two brandy bottles. After trial, the Accused was convicted and imposed a jail term of one year RI for each count. Being aggrieved by the

conviction and the sentence, the Accused appealed. Pending the appeal, the Petitioner (the Petitioner) claiming to be the husband of the sister of the Accused person's wife filed an application for bail on behalf of the Accused. The State objected to this application on the footing that there were no exceptional circumstances to grant bail. The learned High Court Judge, after inquiry, refused bail.

The petitioner, being disagreed with the order of the learned High Court Judge, presented this revision application to revise the said order.

The State objected to this application on two grounds, that is there are no exceptional circumstances to exercise the revisionary jurisdiction of this Court and no exceptional circumstances to grant bail to the convicted prisoner.

The order on a bail application in High Court is considered as a final order within the meaning of the Criminal Procedure Code. It has been observed by Eric Basnayake J. in the case of Cader (On behalf of Rasheed Kahan) v. Officer In Charge Narcotic Bureau [2006] 3 Sri L R 74 that "*the orders refusing to grant bail are considered as final orders which appeals lie.*" The Petitioner, as of a right, would have appealed against the order of the learned High Court Judge, but have opted to petition this Court to invoke the revisionary jurisdiction. When the right of appeal is available, the revisionary jurisdiction is exercised by the appellate courts to prevent the miscarriage of justice. It has been held in the case of Vnik Incorporation Ltd. v. Jayasekara [1987] 2 Sri L R 365 that;

In Perera v. Muthalib (supra) Soertsz, J. set out that the revisionary powers of the Supreme Court are not limited to those cases in which no appeal lies or in which no appeal has been taken for some reason and that the Court would exercise revisionary powers where there has been a miscarriage of justice owing to the

violation of a fundamental rule of procedure, but that this power would be exercised only when a strong case is made out amounting to a positive miscarriage of justice. In that case the bond of surety had been forfeited without an inquiry.

In the case of Attorney-General v. Podi Singho (supra) Dias, J. held that even though the revisionary powers should not be exercised in cases when there is an appeal and was not taken, the revisionary powers should be exercised only in exceptional circumstances such as (a) miscarriage of justice (b) where a strong case for interference by the Supreme Court is made out or (c) where the applicant was unaware of the order. Dias, J. also observed that the Supreme Court in exercising its powers of revision is not hampered by technical rules of pleading and procedure.

That was a case where a sentence below the minimum sentence prescribed by law had been imposed.

Although both those cases were decided long before the present Constitution was promulgated (incorporating Article 145) and the amendment to section 753 of the Civil Procedure Code in 1988, the Supreme Court expressed the view that its revisionary powers should be exercised where a miscarriage of justice has occurred due to a fundamental rule of judicial procedure being violated, but only when a strong case is made out amounting to a positive miscarriage of justice.....

The revisionary jurisdiction of this Court is not hampered by the availability of the right of appeal, but the courts are slow in exercising the discretionary jurisdiction unless there are exceptional circumstances.

Bank of Ceylon V Kaleel and others [2004] 1 Sri L R 284

(1) The court will not interfere by way of revision when the law has given the plaintiff-petitioner an alternative remedy (s.754(2)) and when the plaintiff has not shown the existence of exceptional circumstances warranting the exercise of revisionary jurisdiction.

Per Wimalachandra, J.

"In any event to exercise revisionary jurisdiction the order challenged must have occasioned a failure of justice and be manifestly erroneous which go beyond an error or defect or irregularity that an ordinary person would instantly react to it - the order complained of is of such a nature which would have shocked the conscience of court."

Dharmaratne and another V Palm Paradise Cabanas Ltd and others [2003] 3 Sri L R 24

Per Amaratunga, J.

"Existence of exceptional circumstances is the process by which the court selects the cases in respect of which the extraordinary method of rectification should be adopted, if such a selection process is not there revisionary jurisdiction of this court will become a gateway of every litigant to make a second appeal in the garb of a Revision Application or to make an appeal in situations where the legislature has not given a right of appeal."

The practice of Court to insist on the existence of exceptional circumstances for the exercise of revisionary powers has taken deep root in our law and has got hardened into a rule which should not be lightly disturbed. The words used by the legislature do not indicate that it ever intended to interfere with this 'rule of practice'.

In the present case the delay in hearing appeals is submitted as an exceptional ground in considering the sentence imposed is only two years imprisonment. The appeal is not yet listed for hearing. The learned Counsel for the Respondent submitted the dissenting judgment of Sisira de Abrew J. in the case of *Ediriweera v. Attorney General* [2006] 1 Sri L R 25 where His Lordship has held that "*Delay in preparation of the appeal brief and the delay in taking up the argument - considering the facts of this case - do not come under the category of exceptional circumstances.*" But in the majority judgment delivered by Balapatabendi J. with Wijerathne J. agreeing held that "*The other point to be noted is from our experience in the Court of Appeal we note that it will at least take more than one year for this appeal to be taken - up, and at present we hear the appeals lodged in 2001, 2002 and 2003; further at present we have fixed appeals up to March, 2006. So that, the final determination of this appeal may take many years, and it could be considered as a "long delay" to determine this appeal.*" This observation was made in 2005 August. This was not the only point considered to grant bail in that case. The Accused himself was a sick person and his father was a cancer patient. The Accused was not the principal offender. Considering the surrounding circumstances with the delay in hearing the appeal the Court considered there are exceptional circumstances.

In the present case except the delay in hearing the appeal, there are no other exceptional reasons. The Petitioner states that the wife of the Accused is a cancer patient. But the learned High Court Judge has found that she has not taken any treatment for years. The Accused is also said to be suffering from illnesses like diabetics, high blood pressure and eye related deceases. There is no proof to say that those illnesses cannot be treated at the prison hospital.

Under these circumstances, delay in hearing the appeal alone cannot be considered as exceptional circumstance to exercise the revisionary power of this Court and to grant bail to a convict.

Accordingly the application is dismissed.

Judge of the Court of Appeal

H.C.J.Madawala J.

I agree.

Judge of the Court of Appeal